Case No: 2202512/2016

EMPLOYMENT TRIBUNALS

Claimant:	Ms M Dewhurst
Respondent:	Citysprint UK Ltd
Heard at:	Central London Employment Tribunal
On:	22, 23, 24, 25, 28 and 29 November 2016
Before:	Employment Judge JL Wade (sitting alone)
Representation	
Claimant:	Mr J Galbraith-Marten QC (Counsel)
Respondent:	Mr T Brennan QC (Counsel)

JUDGMENT

The judgment of the Tribunal is that the claimant was a worker of the respondent and that it unlawfully failed to pay her for two days' holiday.

REASONS

1. The claimant, Margaret Dewhurst, is a cycle courier. She argues that she is a worker within the meaning of section 230(3)(b) of the Employment Rights Act, otherwise known as a "limb (b) worker" who:

> *"has entered into or works under.... Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".*

2. Her claim is for two days' holiday pay in respect of holiday which she took but has not been paid for. This is an individual claim by one claimant and, whilst it may have implications for her colleagues, my job is to make a decision in her particular case. Therefore, when I refer to "couriers" I am referring to her role as a cycle courier unless otherwise stated and my conclusions about couriers in general are for the purpose of deciding Ms Dewhurst's case in particular.

3. The claimant originally claimed that she was both an employee and a worker and the respondent argues that by abandoning the employee claim she demonstrates that she is prone to exaggeration and only climbs down when challenged. I do not agree with this characterisation and respect the fact that she has refined her case as it has progressed in the light of the evidence. In my experience this happens all too infrequently.

The Evidence

4. I heard evidence from the claimant (an original and a supplementary statement) and from Mr Jonathon Katona, a cargo bike courier, and Mr Seamus O'Eachtiarna, a general fleet courier, on her behalf.

5. For the respondent I heard from Simon Baker, a former cycle courier now Head of Fleet and Compliance, who is responsible for both internal rules and the regulations that govern any courier business, Scot Brown, Regional Manager for London and Michael Turner another general fleet courier.

6. I read the pages in the bundle to which I was referred.

7. Much of the evidence was uncontested, the issue being its legal interpretation. Where it was contested I explain my conclusions.

The issue

8. The respondent's standard contract is entitled "Confirmation of Tender to Supply Courier Services to CitySprint (UK) Limited". In it the courier is referred to as the "Contractor". I set out various important sections:

> *1. **"Job"** means an opportunity offered by CitySprint to perform the Services.*
>
> ***"Services"** means courier services and other ancillary services (if any).*
>
> *2.3.1 The Contractor agrees and warrants that he is a self-employed contractor and is neither an employee nor a worker and CitySprint enters into this agreement on that basis.*
>
> *3.1 During the term of this agreement, where the Contractor agrees to undertake a Job, the Contractor shall comply with the Job details (including but not limited to collection and delivery times as applicable), provide the Services using reasonable care and skill and shall use his best endeavours to promote the best interests of CitySprint. The Contractor has discretion to determine the manner in which the services are performed at all times, including but not limited to the route.....*
>
> *3.2 The contractor warrants and represents that he has read and understood the Information Booklet.....*
>
> *3.4 The Contractor shall advise CitySprint of the days on which the Contractor is available to accept jobs and on such days when the contractor is available, the Contractor shall advise CitySprint if at any time on that day*

he no longer wishes to undertake Jobs. CitySprint has no obligation to offer the contractor work at any time and the contractor has no obligation to accept any particular Job. The Contractor may also accept work from other sources during the term of this Agreement. The contractor may also accept and undertake work from other persons or organisations whilst in the process of undertaking Jobs. This means that the Contractor is entitled to be providing Services to both CitySprint and other organisations at any particular moment, provided that the Contractor has informed CitySprint of other commitments prior to accepting any Job and the acceptance of that other engagement does not prejudice the timely and proper performance of the Job that the Contractor has accepted.

3.5 The Contractor may at his own cost provide a substitute to perform any particular Job. However, if that substitute is not a person or an entity who or which has itself already entered into a Tender Agreement with CitySprint the substitute shall be a person or entity which has the required insurance cover, knowledge, skills and ability and is able to satisfy CitySprint as to its competence and with whom CitySprint would be prepared to offer to enter into a Tender Agreement. Should the Contractor provide a substitute for many of the services, he shall first notify CitySprint in writing accordingly. The Contractor shall at all times be wholly responsible for ensuring that the substitute is suitable to undertake the Services and adheres to CitySprint terms and conditions of trading and all other obligations of the Contractor as set out in this Agreement. Any Fees due from CitySprint for the performance of the Services by the substitute will in the circumstances, continue to be payable to the Contractor as set out in this Agreement, and it would be the Contractor's sole responsibility to make any payment to the substitute. The Contractor will remain at all times fully liable for any loss and/or damage caused to CitySprint by the acts or omissions of the substitute. CitySprint can require the Contractor to remove any substitute or anyone who works for the Contractor from CitySprint's and/or its clients' premises at any time and not to provide the Services to CitySprint again.

3.6 On reasonable request of the Contractor, CitySprint may be prepared to release the Contractor in whole or in part from its obligation to carry out a Job that he has accepted. CitySprint reserves the right to charge and/or deduct from the contractor's is the sum of £25 on each occasion that the Contractor makes such request....

6.1 The Contractor will at all times maintain, with an insurance company of good repute, such insurance as is appropriate during the term of this Agreement."

9. The claimant accepts that if the actual agreement is as set out in the Tender she cannot be a worker. The issues are therefore:

1. If the contract document may not express the true agreement "what was the true agreement between the parties" (as expressed by Lord Clarke in *Autoclenz v Belcher* [2011] ICR 1157)?
2. Is the claimant a "limb (b) worker" under the true agreement?
3. If so, when was the claimant a worker because this will affect the amount of holiday she is entitled to and perhaps the amount payable for a day's holiday.

I set out below the findings of fact relevant to these issues.

The relevant facts

Overview

10. The respondent says that it is "the UK's largest and fastest-growing same-day courier business". It operates 365 days of the year and uses about 3,200 self-employed couriers in GB. It provides courier services for regular clients under service agreements, and also for one-off customers.

11. In London, CitySprint operates a fleet of between 50 and 60 cycle couriers; I do not know how many van drivers there are. There are several control centres in London staffed by:

(a) A telephone/sales team which takes bookings from customers, for cycle courier services the offer is that an item will be picked up and then delivered within a tight pre-agreed timeframe.
(b) A team of Controllers who allocate the work and who have been described as "chess players controlling the pieces on a chess board".
(c) The Courier Liaison Team
(d) Managers.

The respondent did not provide a controller to give evidence which was a shame because they are the direct interface with the couriers and know best how the arrangement works in reality on a day-to-day basis.

12. Ms Dewhurst, who trained in architecture, agreed to the "Confirmation of Tender" document on 14 October 2014 and since then she has worked as a cycle courier, latterly in its medical fleet which consists of about 10 couriers. She had worked for the respondent on a couple of previous occasions.

13. She does not work for profit for any other company or individual but agrees that she could in theory do so on her days off. Various slightly disparaging remarks were made about her involvement with the Independent Workers Union of Great Britain, but I did not see the relevance. Mr Katona, her witness, set up the inactive "Sensei Couriers" in early 2015 and he was not breaking any terms of his "employment" with the respondent by doing so because there was no restrictive covenant in the Tender. The respondent points to this business as evidence that he is its contractor, but there is also a marked contrast between his failed efforts as an entrepreneur and the fact that he continues to earn a living from the respondent, arguably as its worker.

14. Ms Dewhurst typically, though not invariably, works four days a week, starting "on circuit", as both sides call it, at around 9.30 in the morning and ending around 6.30 at night. It is agreed that during this time she is generally busy moving from job to job, mainly in central London. Gaps in between Jobs occur sometimes and can range from 10 minutes to an hour around lunchtime if things are quiet and during that time she waits for work and, apart from perhaps having something quick to eat, is on standby. This is how she wants it because once on circuit she does nothing else except work. It is CitySprint which has the power to regulate the amount of work available and it keeps the couriers busy by limiting the size of its fleet. As Mr Turner said: "*I give a them my time and they give me work. If they didn't, I'd just go somewhere else*".

15. As is the practice with all couriers, not long after she sets out in the morning from her home in south London, she both speaks to a controller and logs into the respondent's "Citytrakker" system. She does not log out again until she has spoken to a controller and agreed that she is going home at night, the respondent says that this was a courtesy and the claimant a requirement. It is therefore easy to calculate when a courier is on circuit.

16. Each courier carries an electronic "Citytrakker" device which tracks her whereabouts and helps to manage the jobs, "Job" being the word used for each separate delivery assignment. However, they also use a radio and their own mobile phones to keep in touch because no one method is fully satisfactory. CitySprint is in the process of developing an App.

Recruitment of cycle couriers, day one

17. It is common ground that there is a two-day recruitment process. It starts with an interview where according to the respondent's written procedure the "applicant" (not "potential Contractor seeking to Tender") comes in and has a one to one conversation with a manager, provides proof of identity, fills out various forms (including one for a DBS check) and sits a knowledge test.

18. The eight-page Confirmation of Tender document is "signed" on day one. It is not talked through in detail, it is not in fact signed physically and hard copy is not provided. Instead, the courier must go through an electronic tick list whilst sitting at a computer in the office acknowledging the key terms by clicking "Yes" to phrases which emphasise the self-employed nature of the work. They include:

> *"- I am under no obligation to provide my services and CitySprint UK Ltd is under no obligation to give me any work at any time.*
>
> *- I can send a substitute in my place to do my work so long as they can do the same work I have agreed to do.*
>
> *- If I do not work I will not get paid. As a self-employed contractor I will not be entitled to holiday sick maternity payments or any employee benefits.*
>
> *- I am an independent business and pay my own costs such as fuel and vehicle costs for operating in this way.*
>
> *- I confirm that I have read and understood the courier handbook"*

19. Until the tick list has been completed, with "Yes" being the answer to each question, the courier cannot start work or get access to the intranet, called "iFleet" which, for example, holds copies of their invoices. The courier is given the accompanying Information Booklet/ courier handbook to take away but does not read and understand it before "signing" the Tender.

20. Ms Dewhurst had worked for the respondent before and so her recruitment process in 2014 was somewhat curtailed. However, the process of signing the Confirmation of Tender was the same and she considered that she had no choice but to sign. She did know that she was signing up to be self-employed, and thereafter she completed her tax returns accordingly, but what she did not know was what type of self-employed person she had become. As far as she was concerned she was now "working for" rather than providing services

to CitySprint.

Day two

21. If successful on day one, couriers participate in day two which is an induction course. Ms Dewhurst participated in 2011 and she described how Magda, a Control Assistant who was not called to give evidence, delivered training which "covered every facet of the job and set down in precise terms the way in which I was expected to work at each stage of the process". After training on how to use the "Citytrakker" there is "Operations training" where a trainer talks groups of six new couriers through a set of slides. These include (other examples are given below):

- *"Ways to properly greet a customer: Smile with your greeting. Smiling goes a long way towards showing clients that our couriers are professional and trained to a high standard. Smiling also helps to add a personal touch."*

- *"What you do if no one is home: Only if instructed by your controller can you do one of the following.... Leave it with a neighbour"*

22. I conclude that Clause 3.1 of the Confirmation of Tender does not reflect reality in that, whilst the contractor does have discretion as to the route used, she does not have discretion to determine the manner in which the services **are** performed.

23. These instructions are consistent with the website which cannot be dismissed as "advertising puff" when it says that "our couriers" provide a "secure, dedicated" service and are "fully trained" because this is a key part of the sales **pitch**.

24. Mr Brennan argued that all this was a specification of the work required of the contractor but that is an artificial construction.

Invoices

25. Couriers are paid by the Job and earn the minimum wage for the hours they work, whatever the analysis of their working hours. Different tariffs for a Job are set by CitySprint depending on its location and urgency, an average of around £3.50 in central London, and the couriers are paid that rate less fixed deductions for uniform and insurance. Some of the less popular Jobs can be subject to an improved payment, for example a trip at the end of the day to Wembley for a courier who is wanting to head home to south London, but this is the exception. Waiting time is not paid but sometimes a courier will be paid by CitySprint if a Job is cancelled by the customer.

26. On induction they are told:

"- All payments are made weekly into your account every Friday
- new starters will work one week in arrears
- we offer a self-billing service
- invoices are available to view on our iFleet system
- any queries on your invoices can be submitted through iFleet."

27. In practice the self-billing service is not "offered" but provided; individual couriers do not touch the invoice from beginning to end and they wait to be paid

each Friday in arrears. This is of course of great benefit to them because they do not have to spend hours working out how many deliveries they have made at what rate over the week, but it is a payslip in all but name. Even the workers in *Autoclenz* were responsible for recording the work they did for their employer but here Ms Dewhurst relied completely on the respondent's system which calculates payments due to her and at the same time invoices CitySprint's customers.

28. This is a long way from an arrangement whereby a contractor, such as a window cleaner, writes and then delivers their bill from which deductions are only made, generally by agreement, if, for example, they have broken a window.

Substitution

29. As I have already said, the CitySprint website describes "our couriers" who provide a "secure, dedicated" service and are "fully trained". This language is not compatible with the idea that couriers may substitute if they themselves are not able to do the work or if they are building a business whereby they use other people to help them make a profit. I find that in practice Ms Dewhurst did not have the right to substitute. The main findings which support this conclusion are:

29.1 The substitution clause 3.5 in the Tender is contorted and self-desctrucitve. It grapples with the conflict between the desire to have such a clause and the reality that the CitySprint brand cannot be put at risk by the use of arms-length substitutes. The effect is so prescriptive that only couriers who are already on circuit would in practice be able to substitute.

29.2 That being the case, given the complexity of invoicing, allocating Jobs, liaising with CitySprint's customers etc there is no reason why Ms Dewhurst would subcontract the work rather than contact the controller and ask him to reallocate it.

29.3 The Tender in general is not a document which is easy for a non-lawyer to understand and this clause is almost indecipherable. With respect, I strongly doubt that it was known and understood by Ms Dewhurst.

29.4 The respondent did not provide me with any examples of cycle couriers providing substitutes whereas Mr O'Eachtiarna gave evidence that when he had asked to use a friend of his as a substitute for week the request was turned down.

29.5 I was given one example of a pair of cycle couriers who were engaged to do a regular manual job helping to unload a van, this is known as a "Helper" Job and is a different category and tarriff. They had both been doing the work and were paid separately but when it was reduced management asked them to share it. The evidence as to the reasons for this arrangement came late and was controversial, the claimant saying that it had been put in place to defeat her claim. I said that I would not make a finding of good or bad faith because I had not seen all the evidence but as the only example it is a poor one as it is very specific to its circumstances and so atypical.

29.6 All the other examples of substitution which the respondent provided related to van drivers, although there were not that many. I was not able to tell whether they complied with the terms in the Tender document. There were no van driver witnesses and I was given very little evidence

about their working patterns and practices. Whilst the Tender applies to all couriers, it is a generic document in that some of what it says applies only to van drivers so I think that what they do is of limited help to me in deciding the claimant's case.

29.7 The plot thickens in relation to the medical courier work. Under its contract with HCA, CitySprint is the contractor and the contract is very specific about how the services are to be provided by the approved and trained couriers and permission must be obtained for arrangements to change. It would be a breach of contract for CitySprint to allow Ms Dewhurst to substitute.

29.8 As a medical courier Ms Dewhurst cannot give her ID to a substitute and she also has the customer hospitals' ID, for example from HCA, so she alone can do that work. Also, she receives specific extra training and equipment which further limits the ability to bring in somebody else.

Equipment and uniform

30. The training course deals with both. It says:

- *"Charges: the relationship between CitySprint and our self-employed couriers is a business one. Our couriers provide us with courier services for which we pay them. We provide certain equipment to enable them to provide us with courier services for which we make charges each week. A weekly charge is made for your equipment, uniform and ...insurance....*

- *Dress professionally. CitySprint issue all couriers with uniform, and you are expected to wear this uniform. If you are found not to be wearing this uniform then you may find that you will be paying a higher courier pack tariff".*

31. Couriers are provided with the CityTrakker device, a bag, uniform (varying from a badge to a full outfit) and ID. This is called the "Courierpak" and they pay for it through deductions from their weekly pay. Thus, they are provided with some of the tools of their trade for which they pay a pre-ordained figure through a deduction from their "invoice". However, when a courier starts to work on the medical team they are provided with the additional equipment needed free of charge. This is a blood box and a spill kit, necessary for safe transport and to deal safely with accidents.

32. During the hearing the respondent's witnesses denied that the couriers had to wear uniform and said that those who did were incentivised by a reduced courier pack charge so that the current procedures were out of step with the current practice. The witnesses who were couriers all said that they wore some form of CitySprint insignia and I find this to be the case.

33. The respondent requires a professional looking fleet, which is a selling point so it would be very odd if no branding was required and some of their clients demand uniform or at least a badge for security. Also, the variation in the charge for the courier pack is more of a penalty than an incentive. Enforcement of this rule is of course another matter because the couriers are flying around London on their own all day and if, as Mr Turner described, they are not properly

uniformed because "it is in the wash" this will probably not be known, let alone a penalty charged. He, the respondent's witness, wore some form of uniform at all times even if it was only the CitySprint bag.

34. They are not provided with bicycles and they must provide their own main "tool of the trade" although these are briefly inspected on induction to make sure that they are not emblazoned with inappropriate slogans etc.

Insurance

35. The couriers have to have goods in transit and public liability insurance. This can in theory be provided independently by them but in practice they are told on induction that insurance is part of the weekly deduciton and this is what invariably happens. Insurance which is negotiated in bulk by CitySprint is cheaper too.

The relationship with the controllers

36. The analogy of chess player and chess pieces was thought by the witnesses to be a good one. Whilst the Citytrakker is a useful piece of equipment it is not the main link between the couriers and the business; if it was, this would indicate a rather more arm's-length kind of relationship but in fact the couriers are much more integrated into the organisation than that.

37. The radio, and when that does not work personal mobile phones, are regularly used to say hello in the morning and to agree that it is mutually convenient for the courier to go home at night. In the first conversation the courier will ask what area of London they are likely to be needed in and this will define their cycle route from home. Then, during the day, they may discuss a particular Job and also what may be coming up next and what area it is best to wait in, they tend to stay around where they last dropped off so that the controller knows where to find them, unless a different arrangement is agreed on the telephone or radio.

38. It is in the interests of both sides to have a good working relationship and CitySprint has been successful in nurturing that. Apparently most couriers have not only call signs but also mutually agreed nick names which they and the controllers use. Mostly they all get on well but Mr Turner explained that if he did not think that he was getting a fair share of the work he would go into the office. If he saw from the controllers' screens that work was indeed light he would not complain, but if he thought that there was work going which he was not getting he would complain first to the controllers and then to courier liaison who would have a word on his behalf.

39. The controllers do not reward effective couriers by taking work off less effective couriers, in other words Ms Dewhurst is not able to improve her business opportunities by her endeavours. The controllers keep her busy nearly all the time and the idea is that they ensure a fair spread of work across the fleet on circuit that day. If a courier is not keeping CitySprint's customers happy, for example by missing deadlines, losing parcels or being rude they will be talked to as part of the rudimentary disciplinary process described by Mr Brown and ultimately they will be removed from the fleet and replaced by someone from the waiting list.

Choice when to log on and off/ which days to work

40. The respondent has a limited number of couriers on its books. This is the

way it makes sure that they are busy and adequately paid so that the best ones are working for CitySprint. When I say adequately paid, Ms Dewhurst earned between £15 and £18,000 last year for working four days.

41. As clause 3.4 of the Tender document says, contractors are asked to tell the controllers of the days on which they will be available for work. The controllers also have a rough idea who is going to be working because most of the couriers work four or five days a week and they operate on a margin of error of between 20 and 30% more couriers on the books than they think they will need. If they have too little work, they may tell a courier who rings in to come on circuit quite late in the day not to bother. If too much, they will quote waiting times to clients which may mean that they go elsewhere and in the longer term they will take people off the waiting list and give them a call sign so that they can come on circuit.

42. Mr Baker described the "all hands to the pumps" ethos which meant that if a courier was rarely available to work days on a regular basis they would not be part of the team who his organisation would want to use. Other literature talks about the "CitySprint family", one which often does well at the national courier awards where in 2015 "CitySprint couriers deliver record awards haul" so there is an ongoing relationship between the couriers and the respondent.

43. No one at CitySprint works or talks in hours rather than days even though the working day can vary by an hour or so at either end; the question is what days a courier works. A significant minority of couriers seem to work less regularly. There may be particular reasons for this, for example Mr Katona rides a cargo bike (equivalent to a small van on pedals) and suffers from poor health. This means he is not physically able work that many hours but because his bike is a fairly unique facility his irregularity is tolerated. I do not regard him as a cycle courier and he tells me that he is in fact treated the same as a van.

44. Ms Dewhurst says that any change to her four-day pattern, including holiday, was always discussed with the controllers and she described in convincing detail one example where she had been asked/ told by a controller called Jamie not to take holiday in September because that would leave CitySprint short and took it in August instead. CitySprint did not call Jamie to give evidence about his reasons for saying this. She described how she agreed working patterns with Courier liaison person Dave Kaye and Controller Alex Landowski, neither of whom were called by the respondent.

45. She also described how she had been told that she needed to work at least three days a week because it was not worth the company's while otherwise given the management needed. As a result, she had stopped working for CitySprint for a time because she had a conflicting part-time architectural job which also required her to work three days a week.

46. Despite the respondent's protestations I conclude that the respondents do exercise a level of control over the working patterns of their couriers because:

46.1 The business model on both sides requires a level of consistency. This makes complete sense because it would otherwise be very hard to plan the week even with the 20 to 30% margin of error.

46.2 Since they do not have security of tenure the couriers feel obliged

to do as they are told to make sure that they keep being offered work.

46.3 The "Information booklet" referred to in the Tender document says you get knocked off the list if not in touch for five days (except by agreement).

46.4 When asked about whether the respondent would accommodate couriers who only offered to work half a day Mr Baker said that of course this could be done but he gave as an example a courier who was doing the knowledge to become a black cab driver. I was not given any examples of couriers who worked random times at whim without explanation or who did not work in days.

47. I accept that the couriers also want to work a number of days because they need to earn a living wage, and full days because most do not live in central London and cannot go to and fro; they are not high earners which means that they are unlikely to want to entertain themselves in central London when off duty. This is very often the case with employees too, of course, since a successful working relationship is good for both sides.

48. On the other hand, Ms Dewhurst agreed that her documented working pattern is not fully unpredictable. She does quite often stick to the pattern which she argues for, which is Monday, Tuesday, Thursday and Friday but sometimes she does not, her estimation being that she sticks to the agreed arrangement 95% of the time. Sometimes an irregularity in pattern would be holiday if that was recorded, which of course it is not.

Choice to work when on circuit

49. Once on circuit and logged on a courier will only say no to a Job for a good reason, Mr Baker confirmed that there was an expectation that when the couriers logged on that was when they wanted to work. This is invariably the case, which again makes good business sense. Mr Turner was unable to give examples of how he picks and chooses work when logged on which he put down to his professionalism. Ms Dewhurst was also proud of her professionalism but did describe one incident where she was feeling unwell at the end of the day and asked the controller if she could go home. She was told that he could not find somebody else for a Job and so she could not go. The respondent did not provide the evidence to rebut this. She accepted this instruction because she thought that it was her obligation and she feared not being given more work if she refused. This is inequality of bargaining power at work.

50. There is a recording of a conversation between Mr Katona and a controller called Ian. Mr Katona had a problem with an item which he had collected but could not deliver at the end of the day because the premises were shut. As trained in the induction, he telephoned the controller for instructions. When he asked whether he could do what he wanted with the item the controller replied (and I quote from the respondent's recording):

> *"no, I'm afraid so, I'm afraid you can't really - I mean that's all bullshit - as we all know isn't it.... That you self employs [sic] can do exactly what you want - I mean if that was the case we wouldn't have a business would we, really?"*

The controller subsequently tried to explain his comments away in an email but did not come here to give evidence.

51. Neither Mr Baker nor Mr Brown were convincingly able to give examples of how couriers on circuit picked and chose Jobs without explanation and good reason.

Choice to work when a Job has been accepted

52. Ironically, the Tender document is more accurate than the respondent's witnesses in stating that the contractor may be released from a Job only on reasonable request. None of the witnesses could even conceive of a situation where a courier would drop out for no good reason even though the respondent's witnesses insisted that this was permitted. The few examples given in the bundle were all of couriers who had a good reason for giving up and most were van drivers outside London who, for example ran out of fuel, and so not directly comparable. Given that in preparing for the hearing the respondent had access to voice recordings of all the dealings between couriers and controllers this is quite significant.

53. The Tender document does not, however, describe the reality of the situation to the extent that couriers ever have to pay £25 if a Job is cancelled for a good reason; I was given no evidence that such penalty was ever applied. However, even cancellations with good reason are rare indeed because:

> 53.1 The practicality of the situation is that couriers travelling relatively short distances with puncture kits on board are almost always get to their destination;
> 53.2 The "all hands to the pumps" ethos of the organisation expects this;
> 53.3 In most circumstances the Job has to be completed for a courier to be paid and
> 53.4 The controller will expect, indeed require, the courier to complete the Job.

Conclusions

54. The respondent's opening outline says:

> *"The respondent operates courier services around the UK. Self-employed van drivers, motorcycle riders and cycle couriers all make their services available to CitySprint, on relevantly the same terms".*

By contrast, when Ms Dewhurst was questioned she said:

> *"I work hard for them so that they can maintain their relationship with their clients."*

55. Not only is the phrase "make their services available" as opposed to "work for" a mouthful, it is also window dressing and I find Ms Dewhurst's description to be more accurate. Her phrase expresses not only that she provided her services personally but that CitySprint was not her customer but her employer.

56. Mr Brennan warned against paraphrasing the statutory test, which is of course helpful advice. However, I do think that whilst it is necessary to look at the separate limbs of the test, it is also important to look at the relationship as a whole. This is not least because where an individual is not working for

themselves or supplying services to a customer the chances are that they will be performing the work personally and vice versa. In this case Ms Dewhurst is in a simple binary relationship with the respondent; one courier working personally for one organisation at any one time and any concept of her operating a business is a sham.

57. Another way of putting it is that the claimant is both economically and organisationally dependent upon CitySprint not only for her livelihood but also for how it is earned. Whilst a rather unsuccessful person operating a business on their own account could end up having only one client or customer they would not be in this position.

Primacy of the contract?

58. Lady Smith in the Court of Appeal in *Autoclenz*, at para. 69 said:

> *"It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee. I can see that the argument of the employee is rather less attractive where, for many years, he accepts that he is a self-employed contractor and benefits from the rather more favourable taxation arrangements which are available to people running their own businesses. However, it seems to me that, even where the arrangement has been allowed to continue for many years without question on either side, once the courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties had been content to accept over the years. In short I do not think that an employee should be estopped from contending that he is an employee merely because he has been content to accept self-employed status for some years."*

59. In this case, of course, the claimant was correctly treating herself as self-employed in her tax returns because both workers and independent contractors will provide their services pursuant to a contract for services, it was just a question of whether she was a worker or a contractor.

60. In the post-*Autoclenz of the* era I understand the law to be that whilst the express terms of the contract are key pieces in the jigsaw, the bar is low before the true situation can be explored. This is an unusual way of construing contracts, as discussed in *Autoclenz* in the Court of Appeal where Lord Justice Aikens said:

> *"..... The circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so"*

61. At paragraph 35 of the Supreme Court judgment Lord Clarke added:

> *"... the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

62. The threshold, therefore, is low and the facts found above are sufficient to trigger the concern that the Tender document may not reflect the true agreement between the parties. There was clear inequality of bargaining power and the true situation is very different from that portrayed in the Tender, starting with the name of the document itself as there was no tender process at all. Mr Brennan argued that the training materials were a specification of the work required of the contractor, but that is an artificial construction.

63. Mr Brennan also argued that there had to be a contract and that, unlike in *Autoclenz* where there was an old contract to revert to (albeit one in which the employees were still referred to as subcontractors), there was no other contract than the Tender document. Therefore, it had to apply. I am satisfied, however, that there does not have to be an identified moment in time when the terms of the agreement were concluded, in writing or otherwise. Instead, as Lord Clarke said, I have to look at all the circumstances across the period of time when they were in place.

The Tender document and the true situation

64. The very title of the document "Confirmation of Tender to supply Courier Services to CitySprint" arouses the suspicion that the contract may have been generated by the "army of lawyers" described by Mr Justice Elias in *Kalwak*.

65. The tick box exercise on recruitment which acts as an effective barrier to employment exacerbates that suspicion and illustrates the inequality of bargaining power.

66. We then move on to see that the manner in which the respondent controls how the services are performed, set out in the respondent's own recruitment procedure, is not consistent with the contract. I conclude that Clause 3.1 of the Confirmation of Tender does not reflect reality in that, whilst the courier does have discretion as to the route used, she does not have discretion to determine the manner in which the services are performed. See, for example, paragraphs 21-22 and 50 above.

67. Further, given the working patterns, Clause 3.4 of the tender document is inaccurate in that workers cannot in practice accept and undertake work for others whilst in the process of undertaking Jobs. Also they cannot pick and choose Jobs when on circuit.

68. Clause 3.5 of the tender document does not reflect the true situation to the extent that it is said to allow real substitution as opposed to the swapping of Jobs between CitySprint couriers which is the only option in reality, see paragraph 29 above. Also, in terms of insurance the reality of the arrangement is in conflict with clause 6.1 of the Tender document, see paragraph 35 above.

69. The respondent has emphasised that much of the claimant's working

relationship operated by agreement and discussion rather than a more "command and control" pattern which it says indicates that there was no contract for services. I do not agree. The relationships between colleagues, controllers and other staff seem to be fluent and non-hierarchical as the nick names and Mr Turner's evidence show, but there is a contract nonetheless.

Personal performance

70. Ms Dewhurst provides personal performance to the respondent as set out in paragraph 29 above. There seem to be some circumstances in which van drivers and "helpers" can substitute, but not, in reality, cycle couriers. I cannot say whether the van drivers and helpers are therefore not workers but I can say that their position does not negate the claimant's.

71. If I am wrong, however, the opportunity available to Ms Dewhurst is so small that it cannot be said to show that she did not render personal service to the respondent. Everybody, even an employee, may in the unexpected circumstances ask somebody else to help them out but that does not change the fundamental nature of the working relationship. The legal test is not whether there is a valid substitution clause but whether the claimant was contracted personally to carry out the work, which she was.

72. Even in *Ready Mixed Concrete* was it observed that a "limited and occasional power of delegation" might not be inconsistent with a contract of service. How much less so with the "lower pass mark" of "worker" status (Underhill LJ in *Windle* [2016] ICR, 721, paragraph 24)?

73. It seems to me that, perhaps influenced by EU law, the emphasis has moved from the requirement forensically to analyse the components of the contract to looking at its main purpose. Mr Galbraith-Marten persuasively argued for the "dominant purpose" approach as discussed by Lord Clarke in *Hashwani v Jivraj* [2011] ICR 1004 at paragraph 67:

> *"An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not—if, for example, the dominant feature of the contract is a particular outcome or objective—and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field."*

74. I conclude that the substitution clause in the Tender does not have the effect that the respondent argues for and that the claimant is contracted to perform personal service.

The client/ customer relationship

75. As Mr Galbraith-Marten says, the leading domestic authority on worker status is now *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730 in which Lady Hale said:

> *"24. First, the natural and ordinary meaning of 'employed by' is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.*

25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj *[2011] UKSC 40, [2011] IRLR 827 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in* Hospital Medical Group Ltd v Westwood *[2012] EWCA Civ 1005; [2012] IRLR 834, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of s.230(3)(b) of the 1996 Act ..."*

76. The claimant submits that on any view she was recruited by City Sprint to work for it as an integral part and I agree that this was the case. As a worker in a subordinate position the claimant is a typical example of the protection needed from the Working Time Directive, see *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 at para 17(4):

> *"The reason why employees are thought to need ... protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the [Working Time] Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."*

77. I do not think that the old pre-*Autoclenz* cases of *Mingeley v Pennock* and *Smith v Hewitson* have enough weight to impact on these conclusions.

78. I have no doubt that the claimant was working not for herself with CitySprint as her customer but on the respondent's behalf. Couriers out on the road on their own bicycle enjoy a certain amount of freedom (sometimes this is the freedom to get very cold and, at worst, have an accident for which they receive no sick pay) but the network of connections back to CitySprint is very sturdy. The claimant and her cycle courier colleagues are:

78.1 Expected the work when they say they will
78.2 Directed throughout the time that they are on circuit
78.3 Instructed to "smile with your greeting" and wear the uniform
78.4 Told what to do if the parcel cannot be delivered as instructed
78.5 Told when they will be paid and paid according to the respondent's formula after it has made deductions
78.6 Told that they are part of the "family" who the respondent describes as "our couriers" on many occasions.

79. Overall, they have little autonomy to determine the manner in which their services are performed and no chance at all to dictate its terms. In public, in dealings with their controllers and between themselves the couriers regard themselves as part of the CitySprint family, for better and for worse.

80. In *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, the

general medical practitioner had the capacity in terms of skill and status to operate a business on his own account and much more power to negotiate terms than Ms Dewhurst and yet he was so integrated into the organisation that he was found to be a worker. Mr Brennan says that the situation would have looked very different if Mr Westwood had no obligation to treat any customer, could terminate the treatment at any time without repercussion, and could subcontract the treatment to someone else. That may be but I have found that Ms Dewhurst *did* have the same obligations as he, at least when on circuit.

81. I contrast the claimant's position with that of the sub-postmaster in *Wolstenhome v Post Office Ltd* [2003] ICR 546. There the claimant was a small business contracting to a larger one, which is of course possible, but he was a business nonetheless and ran a shop with duties delegated to staff so he was not at all the same as Ms Dewhurst.

When is the claimant a worker?

82. The next question is "when was the claimant providing personal services to her employer?"

83. The answer is that she was certainly doing this whilst doing a "Job". Even the respondent does not seriously argue that she had any choice but to finish what had been allocated except in extreme circumstances, which will also apply to an employee.

84. She was also a worker when on circuit, in other words from the time she turned on the Citytrakker and rang the controller until she signed off at night. During this time, she was either working or on standby. She was not providing her services to anyone else nor could she meaningfully do so, and she was not entertaining herself, for example by going out to lunch or to an art gallery. The "all hands to the pumps" ethos expected that this would not happen.

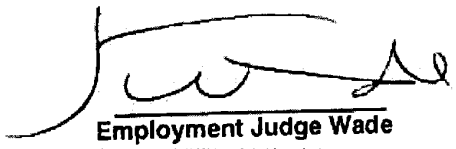
85. It is more difficult to know whether the claimant was a worker under an overarching agreement for four days a week. She did not always work those days and her days did not have set beginnings and ends. This question is complicated by the fact that some of the time she was not working was holiday time which would count as part of her working period had she been granted holiday pay. It seems wrong to edit that period out of the calculation but it is impossible to tell what this period looks like precisely because there is no distinction between holiday and unpaid leave.

86. The claimant did in general have to ask permission, or consent, if she was not going to be turning up four days a week but in practice the pattern was more variable than is consistent with an arrangement which meant that she was a worker providing her services week in week out. The claimant herself said that she was expected to toe the line 95% of time but there was room for manoeuvre. Is this enough to argue that she is a worker permanently under an obligation to provide services four days a week? I do not think so.

87. I conclude that Ms Dewhurst was a worker during the time that she was on circuit. She understood that she should not log on until she was ready to cycle in the direction requested by the controller and Mr Turner was the same. Mr O'Echtiarna took a slightly different approach which meant that he sometimes logged on when at home and if this decision is to have a wider application the respondent will need to put rules in place which tell workers not to log on until

they are ready to work.

88. If the parties need a remedy hearing they should apply with suggested directions.



Employment Judge Wade

Sent to the parties on:

5 January 2017

For the Tribunal: